



**Agenda Number:** 5  
**Case Number:** BA-90014/ZA-90093  
**Hearing Date:** February 3, 2010

**Appellant:** Richard Valdez  
826 Arthur Dr. SW  
Albuquerque, NM 87105

**Agent:** N/A

**Applicant:** Richard Valdez  
826 Arthur Dr. SW  
Albuquerque, NM 87105

**Agent:** N/A

**Site Location:** 826 Arthur Dr. SW

**Zone Designation:** R-1 Single-Family Residential

**Recommendation:** Denial

VICINITY MAP

**Summary:** This request is an appeal of the Zoning Administrator's denial of conditional use approval to allow an accessory building in excess of 600 square feet in area (989-sq. ft. detached garage).

The building, constructed without a permit or the necessary inspections, was proposed to the Zoning Administrator in connection with a variance request (ZA-90092) to allow the subject structure to be located within the required 10-foot separation distance from a dwelling unit. However, as the variance was also denied, only an appeal to the conditional use application was filed. Consequently, the continued placement of the accessory building at just six (6) feet from the existing house will need to be addressed before further consideration can be given to the proposed conditional use.

Although this matter was deferred by the CPC from their November 2009 hearing, the property owner obtained an appeal form, and the owner was instructed by county staff on the related process in filing the necessary appeal application, no additional steps have been taken to address the outstanding issue as of the printing deadline for this matter (January 21, 2010).

**Staff Contact:** Brennon Williams, Zoning Administrator

- Attachments:**
1. Board of Adjustment's Deferral (November 9, 2009)
  2. Appeal application
  3. Notice of Decision (August 18, 2009)
  4. Original application and site plan
  5. Agency comments for ZA application
  6. Site photographs, aerial photograph, zone atlas page

BA-90014/ZA-90093

Richard Valdez appeals the Zoning Administrator's denial of a conditional use to allow an accessory building in excess of 600 square feet in area (989-sq. ft. detached garage) on Tract 24, Babes Addition, located at 826 Arthur Dr. SW, zoned R-1, and containing .177 acres. (M-13) (Original request submitted by Richard Valdez) (DEFERRED FROM THE NOVEMBER 4, 2009 HEARING)

## **BACKGROUND**

### **The Request**

The appellant is requesting that conditional use approval to allow an unpermitted 989-square foot detached garage to remain in the rear yard of the property be granted by the Board of Adjustment.

### **The Property**

The subject site is located at 826 Arthur Dr. SW, zoned R-1, and is approximately .177 acres in area. The property is currently developed with a single-family dwelling and the subject accessory building.

### **The Hearing**

The original request was presented at the Zoning Administration hearing held on August 11, 2009. The property owner, Richard Valdez, presented the request, as well as a related application to vary the required 10-foot separation distance between the garage and the house (ZA-90092). Mr. Valdez testified that he built the existing garage, without the necessary construction permits or approvals, in its current location on the site. He stated that because of the significant cost spent on materials and the time already invested in the project, he was amenable to doing "whatever was necessary" to meet the building code, but removal or remodeling of the garage to meet zoning standards was not an alternative. Mr. Valdez also noted that there were other properties in the neighborhood that possessed similar structures and that the continued placement of the garage in its existing location would not be injurious to the area.

### **The Decision**

The Zoning Administrator denied the request, as well as the associated variance proposal, based on findings that the project did not meet the criteria for approval as outlined in the Comprehensive Zoning Ordinance of Bernalillo County. As the garage was unable to be placed on the site in accordance with the required separation distance, the continued placement of the structure in its current location would be inconsistent with the intent and stated purposes of the ordinance, as well as be contrary to the enumerated protections against overcrowding, fire safety, health, general welfare, and property value.

## **APPLICABLE REGULATIONS**

### **Comprehensive Zoning Ordinance of Bernalillo County.**

#### Section 9. R-1 Single-Family Residential Zone.

- A. The regulations set forth in this section or set forth elsewhere in this ordinance, when referred to in this section, are the regulations in the R-1 Residential Zone. The purpose of this zone is to provide for the development of single-family homes on lots not less than three-quarters [of an] acre in area, except that where community water and sewer facilities are made available, the lot size may be reduced consistent with development densities in the Albuquerque/Bernalillo County Comprehensive Plan. The regulations provide for the health, safety and welfare of the residents.

- B. Use Regulations. A building or premises shall be used only for the following purposes, all uses customarily incidental to the building or premises shall be maintained on site:
1. Prohibited Uses. The following uses are prohibited in this zone:
    - a. The open storage of inoperative vehicles or auto parts;
    - b. The open storage of trash or junk;
    - c. The open storage of large appliances;
    - d. Any use not designated a permissive use or conditional use in this zone, unless otherwise authorized by this Code; or
    - e. Any use not recognized as customarily incidental to a permitted use in this zone.
  2. Permissive Uses:
    - a. Agricultural activity, including truck gardening and nurseries, fur bearing animal farm, the raising of poultry or rabbits, dairy farming, livestock grazing, feeding, and the raising of livestock on lots containing three acres or more. On lots of less than three acres, there shall be at least 10,000 square feet of lot area for each cow or horse, and/or at least 4,000 square feet of lot area for each sheep, pig, or goat, provided that any building, pen, or corral where such animal is located is at least 20 feet from any existing dwelling unit. Stands for the display or sale of home-raised agricultural products, including poultry or rabbits raised on the premises.
    - b. One single-family dwelling or H.U.D. Zone Code II manufactured home per lot.
    - c. Accessory building, structure, or use customarily incidental to the above uses, such building or structure shall be limited to an area of 600 square feet or less.
    - d. Noncommercial library, museum, and art gallery.
    - e. Recreational vehicle or boat storage in the rear yard when such recreational vehicle or boat is not to be used as accessory living quarters, and is not connected to utilities, other than temporarily to a source of electricity. Recreational vehicle used for dwelling purposes served only by electricity for lighting purposes, the use of such recreational vehicle shall be limited to a maximum of two weeks in any calendar year.
      1. In the event where rear yard access is not available, outside parking in the front yard is allowed, provided:
        - (a) The body of the recreational vehicle or boat is at least 11 feet from the front property line.
        - (b) No part of the unit extends onto the public right-of-way.
        - (c) A corner lot is always deemed to have reasonable access to the rear yard; a fence or wall is not necessarily deemed to prevent reasonable access.
    - f. Signs not exceeding eight square feet in area pertaining to the lease, hire, or sale of a premises or sale of home-raised products, provided there shall be no more than one such sign on each lot and provided further that, if illuminated, the source of such illumination shall be nonoscillating and nonflashing.
    - g. Parking incidental to uses permitted in this zone, provided all vehicles which are not parked inside a building are operative and are not wholly or partially dismantled.
    - h. Home occupation.
    - i. Concealed Wireless Telecommunications Facility, provided that it satisfies the requirements of section 22.5 of this ordinance.
    - j. Wireless Telecommunications Antenna located on a public utility structure, provided that it satisfies the requirements of section 22.5 of this ordinance.
    - k. Amateur Radio Antenna/Tower up to 65 feet as measured from grade.
    - l. Garage or yard sale, provided:

1. No more than four events are allowed at a given dwelling in any calendar year. The duration of the garage or yard sale shall not exceed three consecutive days.
  2. No items shall be purchased for a garage or yard sale for the purpose of resale; items shall be of the type normally accumulated by a household.
  3. One non-illuminated, on-premise sign, not exceeding four square feet in area shall be permitted. The sign shall pertain to the garage or yard sale only and shall be permitted only for the three-day period of the sale.
3. Conditional Uses. The following uses may be permitted if approved by the Zoning Administrator in accordance with the procedures and under the conditions set out in the administrative Section of this ordinance with additional requirements deemed necessary to safeguard the best interest of the adjoining property, neighborhood and the community.
- a. Accessory building or structure in excess of 600 square feet in area and incidental to the uses listed under Section 7.B.1. and 7.B.2.
  - b. Amateur Radio Antenna/Tower 65 to 100 feet as measured from grade.
  - c. Church and incidental facilities.
  - d. School.
  - e. Day Care Center.
  - f. Family Day Care Home.
  - g. Temporary festivals, circuses, carnivals or activities in a tent, provided that the use or activity meets the following requirements:
    - (1) The minimum lot size per use or activity shall be five acres.
    - (2) All required parking shall be located on the same site with the activity or use.
    - (3) The use or activity shall be at least two miles from the nearest conforming residential use.
    - (4) Prior approval of the proposed use or activity must be obtained from the County Sheriff, County Fire Department, County Environmental Health, County Public Works, City of Albuquerque Air Pollution Control, and Albuquerque Metropolitan Arroyo Flood Control Authority or their authorized representative.
    - (5) The hours of operation, shall be between 6:00 a.m. and 8:00 p.m. This includes the time of erection and dismantling.
    - (6) The use or activity shall be limited to three days in one calendar year.
    - (7) No permanent structures shall be erected.
    - (8) Temporary fencing may be erected, and shall be removed within 24 hours after the activity.
  - h. Real estate sales office and real estate signs exceeding the limitations in Subsection 8.B.(1).f. above in connection with a specific development for a period of not more than two years.
  - i. Recreational facility (nonprofit) such as swimming pools or tennis clubs on sites containing not less than one acre.
  - j. Temporary storage building or yard for equipment, material or activity incidental to a specific construction project but not to exceed one year, unless the time is extended by the Zoning Administrator.
  - k. Mobile home used as a dwelling (with connections to any utilities) during construction of a dwelling on the same premises, provided such use shall be limited to a maximum period of 24 months.
  - l. One mobile home for a three-year period in addition to an existing single-family dwelling or mobile home on a lot provided it complies with the following requirements:

- (1) The mobile home may be used only by members of the immediate family for the purpose of providing assistance to those members of the family who are elderly, ill, mentally or physically disabled as attested by a licensed physician.
  - (2) The mobile home shall be connected to water and sewage disposal facilities approved by the Department of Environmental Health.
  - (3) The mobile home must be placed on the property in conformance with the setback requirements and located at least 15 feet from any structures on the same or on adjoining property.
  - (4) Placement of a mobile home on the property will not seriously conflict with the character of the area or be detrimental to the values of surrounding properties.
- m. Nonprofit animal facility.
- n. Park.
- o. Home occupation where the business includes visits to the site from clients, customers, patients, patrons, or similar individuals. Such home occupations may allow for employment of one non-family member and may be approved for a period of time not to exceed three years.
- C. Height Regulations. Buildings and structures shall not exceed 26 feet or 2 1/2 stories in height, except as provided in The Supplementary Height and Area Regulations Section of this ordinance.
- D. Area Regulations:
1. Minimum Lot Area and Lot Width. Every lot shall have a minimum area of not less than three-quarters [of an] acre and a minimum lot width of 60 feet, except that where community water and sewer facilities are available, the lot area may be decreased to 8,000 square feet if located in the Developing, Established or Central Urban Areas, or 14,520 square feet if located in the Semi-Urban Area of the Albuquerque/Bernalillo County Comprehensive Plan.
  2. Front Yard.
    - a. There shall be a front yard having a depth of not less than 20 feet except as provided in the Supplementary Height and Area Regulations Section of this ordinance.
    - b. Where lots have double frontage, the required front yard shall be provided on both streets.
  3. Side Yard:
    - a. Except as hereinafter provided in the following paragraph and in the Supplementary Height and Area Regulations Section of this ordinance, there shall be a side yard on both sides of a building the aggregate width of which shall be not less than 14 feet, provided, however, that neither such yard shall be less than six feet in width.
    - b. Wherever a lot of record, at the effective date of this ordinance, has a width of less than 60 feet, each side yard may be reduced to a width of not less than ten percent of the width of the lot, but in no instance shall it be less than three feet.
  4. Rear Yard. Except as hereinafter provided in the Supplementary Height and Area Regulations Section of this ordinance, there shall be a rear yard having a depth of not less than 15 feet.
- E. Parking Requirements. Off-street parking for all uses must be provided in accordance with the regulations set forth in the Off-street Parking, Loading and Unloading Regulations Section of this ordinance.

Section 22. Supplementary Height and Area Regulations.

D. Modification of Area Regulations:

1. Yards, General:
  - a. Whenever a lot abuts upon a public alley, one-half of the alley width may be considered as a portion of the required rear yard.
  - b. Where a lot is used for a commercial or industrial purpose, more than one main building may be located on the lot, but only when such buildings conform to all open space requirements around the lot for the zone in which the lot is located.
2. Accessory Building and Structures:
  - a. Except as herein provided, no accessory building shall project beyond a required yard line along any street.
  - b. Service station pumps and pump islands may occupy the required yards provided, however, that they are not less than 12 feet from street lines.
  - c. Accessory, open and uncovered swimming pools may occupy a required rear yard provided they are not located closer than ten feet to the rear or side lot line and provided they are surrounded by a duly approved wall or fence at least six feet high.
  - d. Accessory buildings which are not a part of the main building although connected by an open breezeway may be constructed in a rear yard, provided such accessory building does not occupy more than 30 percent of the area of the required rear yard, and provided it is not located closer than five feet to the rear or side lot line.
  - e. Any accessory building which does not contain living quarters may be located nearer than five feet to the side or rear lot lines, provided it complies with the following requirements:
    - (1) The wall of any such building adjoining a side or rear lot line which is not a street or alley line shall be fire-resistive to the standard of a one-hour rating.
    - (2) The wall of any such building adjoining a side or rear lot line shall contain no provision for ingress or egress unless special approval is granted by the Zoning Administrator.
    - (3) If there is no common wall between accessory buildings, or if the walls are not adjoining, there shall be at least five feet between such buildings.
  - f. Any accessory building shall be at least ten feet from any dwelling or accessory living quarters except that any accessory building which does not contain living quarters may be closer than ten feet to another accessory building which does not contain living quarters; provided, however, that if there is no common wall between such accessory buildings or if the walls are not adjoining, there shall be at least five feet between the accessory buildings. No accessory building may extend across the width of the yard unless a passage of at least five feet is provided at some point along such width.
3. Front Yards:
  - a. Where an official line has been established for the future widening or opening of a street upon which a lot abuts, then the depth of a front or side yard shall be measured from such official line to the nearest line of the building.
  - b. Garages detached or attached to the main building and entering on the side street of a corner lot shall maintain a setback of 20 feet in front of the garage.

#### **Agency Comments**

Comments received for this request from the Bernalillo County Building Department note that a permit from their office regarding the existing garage is necessary.

### **INFORMATION SUBMITTED FOR THE APPEAL**

The appellant – although conceding to Findings 1 and 2 of the ZA’s earlier denial – argue that the structure will meet or exceed all building codes, will not result in an adverse impact, and is not opposed by other neighbors; and that an “undue hardship” would be created if the building were to be removed.

### **ANALYSIS OF SUBMITTED MATERIAL**

Much like the justification presented at the ZA level for approval of the unpermitted garage, the current arguments for approval of this appeal are irrelevant to the criteria used for consideration of this matter. The claims that the appellant will “demonstrate that the structure will pass or exceed any and all building codes, and thus will meet all permitting requirements” is disingenuous. Compliance with zoning standards – as well as requirements for Environmental Health, Public Works, the Fire Department, etc. – is a related but separate process applied to all development applications seeking a construction permit. Applicants cannot pick and choose which standards they will opt to meet, while at the same time refusing to comply with other requirements. Because these benchmarks are the minimum necessary for permitting, the least an applicant can do is abide by with these requirements: anything less cannot be approved.

Similarly, claims that the building will not have an adverse effect (either on the subject site, surrounding properties, or the community as a whole) are not accurate. Section 2 of the ordinance clearly outlines the purpose of the regulations and restrictions therein (page CDA:4), and by default, proposals that do not meet the specified standards can be considered to be contrary to the stated purposes. Yes, certain property owners may argue that their particular situation warrants a discretionary waiver to the specific regulation (i.e., a variance), but unsubstantiated claims of unknown or unforeseen future difficulties based on the opinions of the property owner are not evidence for approval.

Also, despite assertions by the appellant, a lack of noted opposition to a particular request does not influence consideration of the proposal. Popularity (or lack thereof) is not a determining factor in conditional use requests. If this were the case, zoning applications that experienced opposition would automatically be denied, while applications enjoying support would involuntarily be granted. Obviously, the level of unfairness and irregularity would be blatant, and the stated purposes of the ordinance (ref. Section 2) would be useless. Correspondingly, a reported financial hardship that might be incurred has no bearing on this situation. Removal of the structure is certainly one option to correct this issue, but modification of the building (or the existing house) to meet the standard also seems available to solve the dilemma. In any case, property owners are ultimately responsible for their property, including improvements and the costs associated with those improvements. As such, the enumerated criteria as listed in Section 24 are the only standards that can be used for determination.

Finally – and perhaps most importantly – the primary method of administrative relief of this situation, and the purpose for the recommendation of a deferral from the CPC’s November 2009 hearing, has not been explored. Without an application to appeal the previously denied variance (ZA-90092), the owner has essentially given up any chance to keep the requested conditional use suitable for continued consideration. This is not to say that staff feels the likelihood for approval of a variance could be (or would have been) met for this proposal, but again, the process for having the project duly considered was not followed and seems to have exacerbated an already difficult situation.



## ANALYSIS SUMMARY

CRITERIA	APPEAL INFORMATION	STAFF ANALYSIS
Property is adequate in size & shape?	- This issue has not been addressed in the materials provided for the appeal.	- The building's placement within the required 10-foot separation distance from the existing dwelling unit on the property demonstrates that the lot is not sufficient in size to accommodate the development while maintain compliance with the regulations.
Property can be developed to avoid traffic congestion/hazards?	- This issue has not been addressed in the materials provided for the appeal (but this criterion was not a point of contention for the request).	- No adverse comment or concern about possible traffic problems was determined by the Public Works Department for this request.
Use will not be detrimental to surrounding properties?	<ul style="list-style-type: none"> <li>- The appellant indicates that they are "prepared to demonstrate that the structure will pass or exceed any and all building codes, and thus will meet all permitting requirements"</li> <li>- The appellant claims that there is no adverse impact</li> <li>- The appellant notes "that there have been no objections from the community"</li> <li>- The appellant states that removal of the structure will cause undue hardship and economic loss</li> </ul>	<ul style="list-style-type: none"> <li>- Zoning standards, equally important to those necessitated by the building code, are separate from other regulations and requirements. Compliance with all county standards are necessary for all development projects.</li> <li>- No evidence has been provided to support these claims</li> <li>- Neighborhood support or opposition is not considered for conditional use requests</li> <li>- Finances are not a determining factor for conditional use requests</li> </ul>

## CONCLUSION

The Zoning Ordinance authorizes the Board of Adjustment to hear and determine appeals from the decisions of the Zoning Administrator in denying applications for conditional use permits outlined by the ordinance. However, based on the information provided with the appeal, as well as consideration of the materials and testimony provided with the original application, staff respectfully submits this matter to the BA with the following recommendation:

**RECOMMENDATION**

Denial of BA-90014/ZA-90093, thereby upholding the previous determination of the Zoning Administrator.

Brennon Williams  
Zoning Administrator